SD 26470

IN THE MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT

LEWIS HENDRIX

Respondent,

vs.

KIMBERLY ANN HENDRIX

Appellant.

APPEAL FROM THE CIRCUIT COURT OF
WEBSTER COUNTY, MISSOURI
30TH JUDICIAL CIRCUIT
THE HONORABLE DANIEL MAX KNUST

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a case whereby custody and visitation of minor children were modified. This case does not fall within the category of cases over which the Supreme Court of Missouri has exclusive jurisdiction. Therefore, general appellate jurisdiction lies in The Missouri Court of Appeals, Southern District of Missouri, under Article V, Section 3, Missouri Constitution, 1945, as amended August 4, 1970, August 30, 1976, and August 2, 1982.

STATEMENT OF FACTS

This case involves a child custody dispute. Kimberly Ann Hendrix is appealing the trial court's failure to set aside a judgment modifying the parties' custody rights in regard to the minor children, Logan Hendrix and Mikayla Hendrix.

Kimberly Hendrix and Lewis Hendrix were divorced on March 19, 1999. LF 20. The trial court granted both parties joint legal custody of their children, but gave appellant, Kimberly Hendrix, primary physical custody of the minor children. LF 21. That judgment was modified with regards to child support only on September 27, 1999. LF 35. On January 17, 2003, Lewis Hendrix filed his motion to modify the custody judgment. LF 36.

Mr. Hendrix sought primary physical custody of the parties' minor children. LF 37. Appellant Kimberly Hendrix filed a counter-motion to modify. LF 48. Under Appellant's proposed counter-motion, primary physical custody of the minor children would remain with her, and a modified visitation schedule would be given to Lewis Hendrix. LF 48.

On May 27, 2003, the parties appeared for trial. TR 8. However, there was no trial. TR 8. Instead, the parties entered into and filed a stipulation dated May 27, 2003. TR 9. The parties agreed to work toward a settlement of the custody issues. LF 67. On July 22, 2003, the trial court entered a judgment modifying the decree of dissolution of marriage as to child custody and child support. LF 62. The judgment is dated May 27, 2003, but the judgment bears the file stamp of July 22, 2003. LF 62. Attached to this judgment is the very same stipulation filed on May 27, 2003, except a parenting plan and a Form 14 were now attached to the stipulation. LF 67.

The modification judgment states that on May 27, 2003, the cause came for hearing and that the parties announced that an agreement had been reached resolving all issues in controversy. LF 62. The judgment further states that a stipulation is attached

to the judgment which has been executed by the parties. LF 62. Attached to the judgment is a parenting plan file stamped July 22, 2003, which transfers the children's primary physical residence to the home of the petitioner, Lewis Hendrix, and out of the primary physical custody of Kimberly Hendrix. LF 69. While the stipulation was signed by Kimberly Hendrix on May 27, 2003, the parenting plan was signed by no one. LF 75.

On December 17, 2003, Appellant Kimberly Hendrix filed her motion to set aside the judgment dated July 22, 2003. LF 77. As grounds for setting aside the judgment, Appellant stated that she never gave her attorney any authority to transfer primary physical custody away from her and to the Respondent. LF 99. Lastly, she alleged that the trial court never conducted a hearing and made no findings based upon any evidence that the primary physical custody of the children should be transferred to the father, Lewis Hendrix. LF 100.

On May 20, 2004 the trial court held a hearing on Appellant Kimberly Hendrix's motion to set aside the judgment modifying custody. LF 101. At the hearing, Ms. Hendrix testified that there was never an evidentiary hearing on May 27, 2003. TR 8. Kimberly Hendrix testified that she never saw the parenting plan

which was attached to the judgment and stipulation until after she received it from the Court. TR 10-11. Ms. Hendrix never gave her attorney permission to sign or agree to the provisions contained in the parenting plan. TR 11. Ms. Hendrix testified that there was never any hearing with regards to this judgment, or anything else after May 23, 2003, or at any other time. TR 12-13. Ms. Hendrix testified that she does not believe the parenting plan to be in the best interests of her children. TR 14. The guardian ad litem, counsel for Lewis Hendrix, and Appellant all stipulated to fact that there was no evidence taken with regards to any stipulation or parenting plan of any kind on May 27, 2003. TR 37-38.

On July 6, 2004, the trial court denied Kimberly Hendrix's motion to set aside judgment, but dated the judgment May 20, 2004. The judgment was file stamped July 6, 2004. LF 101. On July 19, 2004, the trial court wrote a letter acknowledging that it did sign the judgment prepared by Appellant's attorney, J. Michael Murphy, on July 6, 2004. LF 102.

POINTS RELIED ON AND AUTHORITIES

POINT ONE

The trial court erred in failing to set aside the judgment modifying the custody provisions of the original custody judgment because the trial court lacked jurisdiction to modify the prior custody judgment in that (1) no evidentiary hearing was ever conducted upon a motion modifying custody and, (2) there was no evidence received to show that there was any change in circumstances to warrant a modification or that a change in custody was in the best interests of the children.

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)

Section 452.410 RSMo.2000

ARGUMENTS AND AUTHORITIES

POINT ONE:

The trial court erred in failing to set aside the judgment modifying the custody provisions of the original custody judgment because the trial court lacked jurisdiction to modify the prior custody judgment in that (1) no evidentiary hearing was ever conducted upon a motion modifying custody and, (2) there was no evidence received to show that there was any change in circumstances to warrant a modification or that a change in custody was in the best interests of the children.

A. STANDARD OF REVIEW

The standard of review is stated in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The trial court will be affirmed unless it misstates the law, misapplies the law, substantial evidence does not support the judgment, or the judgment is against the weight of the evidence. *Id.* There must be an evidentiary basis to support a finding of a change in circumstances, which gives the trial court jurisdiction to consider making a change. *Alt v. Alt,* 896 S.W.2d 519, 521 (Mo. App. W.D. 1995).

Issue

The issue before this Court is a very simple one. Can a trial court modify a custody decree and transfer primary physical custody of minor children from one party to the another, without holding a hearing or hearing any evidence, even if the parties stipulate to the transfer? The answer is no. Missouri law is clear that before a trial court can modify a custody decree, it must conduct a hearing and can only act upon presentation of facts from which it may be determined that a change in custody would be in the best interests of the children.

Sec. 452.410.1, RSMo.2000

Under Section 452.410.1, a court may not modify a prior custody decree unless it finds, on the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that (1) a change has occurred in the circumstances of the child or the child's custodian and (2) that the modification is necessary to serve the best interests of the child. Sec.452.410.1 RSMo.2000.

The holding in *M.F.M. v. J.O.M*, 889 S.W.2d 944 (Mo. App. W.D. 1995) demonstrates the rationale of why a stipulation cannot be the basis of modification. As the Court of Appeals

explains, under 452.410 the trial court must find that the modification is necessary to serve the best interest of the child per 452.410. Id. at 956. This is a legal conclusion upon which there must be evidence. Id. at 956.

As stated in *M.F.M.*:

> Under the statute, the court must **find** that changes have occurred and **"that modification is necessary to serve the best interests of the child."** This finding is a legal conclusion. Thus, while the parties may both agree, or admit in their pleadings, that certain circumstances exist, and while they may even agree or admit that such changes justify a modification to serve the best interests of the child, such admissions do not compel the trial court to make the required conclusion of law. (emphasis in original). Id. at 956.

According to *M.F.M.*, the trial court must make its own independent determination whether a modification is necessary to serve the child's best interests:

> [T]he court is without jurisdiction to modify an original custody decree on a stipulation entered into by the parties but must conduct a hearing and can only act upon

presentation of facts from which it may be determined that a change in custody would be in the best interests of the children. Id. at 956. (citations omitted, emphasis added).

The law is clear. A stipulation is not enough because the trial court must make a legal finding of whether the modification is in the child's best interests. Id. at 956. The finding requires evidence, which therefore requires a hearing which affords the parties an opportunity to be heard.

Our Case

The facts in the case at bar are simple. On July 22, 2003, the trial court entered an order transferring custody of the parties' two minor children from Appellant-mother to Respondent-father. LF 62. The judgment is dated May 27, 2003. LF 62. There was no hearing and no evidence received by the trial court on May 27, 2003. TR 37-38. There was no hearing and no evidence received by the trial court on July 22, 2003. TR 37-38. There was no hearing and no evidence received by the trial court on any date. TR 12-13. There was a stipulation signed by the parties and filed with the court whereby the parties agreed to prepare a parenting plan, which would maximize the time each parent spent with the children during

that parent's non-working hours. LF 67. The trial court modified custody, shifting primary custody from mother to father without a hearing. LF 62, TR 37-38. Appellant filed a motion to set aside the judgment because the trial court did not have jurisdiction to modify custody without an evidentiary hearing, which was then denied. LF 77. Appellant appeals.

This case's facts are very similar to the facts in *Flickinger v. Flickinger*, 494 S.W. 2d 388 (Mo. App. W.D. 1973). In *Flickinger*, the trial court based its findings upon a stipulation between the mother and father as it related to a motion to modify custody of the parties' child. Id. at 390. Again, the Court of Appeals firmly rejected the findings of the trial court due to its failure to receive evidence or make legal conclusions with regards to the best interests of the child. Id. at 392.

In *Flickinger*, the parties in open court, represented by their attorneys, stipulated to accept findings of a Juvenile Officer who was given the task of making an investigation of the parties' homes and making a report to the court as to the suitability of possible placement of the child. Id. at 391. After receiving the report of the Juvenile Officer, the Court entered an Order awarding the custody of the children to the father. Id. at 391.

Neither party testified at any hearing and no evidence was heard. Id. at 390. The trial court then modified custody, taking custody away from the mother and giving it to the father. Id. at 390.

Mother filed a motion to set aside the judgment. Id. at 390-391. At her hearing on the motion to set aside the judgment, mother testified that while she had given authority to her lawyer to stipulate to a Juvenile Officer to make a report, she never stipulated to that report being the only evidence or complete evidence. Id. at 391. She further testified that she never received a copy of the report. Id. at 391. The court overruled her motion and she appealed. Id. at 391.

The Court of Appeals reversed the trial court and made the following observations:

> The responsibility of determining the custody of minor children is controlled primarily by the best interests of the children as found by the court from time to time. Such proceedings are also deeply impregnated by public interest…**[T]he proceedings for change of a custody order are not and never should be cursory or perfunctory, and courts should not only zealously protect the interest of the child, but also afford the**

parents an opportunity to be heard and accord them due process. Id. at 391. (emphasis added)

The basic principle is thus stated in *27B C.J.S. Divorce Sec. 317(8), p. 572-573*:

> An action or issue involving the change of custody of minor children from one parent to another is a judicial proceeding, to be conducted in a strictly judicial manner, in which the decision is to be rendered by the judge only on evidence before him…Id. at 391.

The Court of Appeals in *Flickinger* went on to trace the roots of this rule throughout Missouri law, citing *Drew v. Dr*ew, 186 S.W.2d 858, 865 (Mo. App. W.D. 1945):

> When one seeks to exercise a trust of such importance (custody) the character and fitness of the applicant should be subjected not only to a broad but to a thorough investigation, and very clear and convincing proof of such fitness should be offered, particularly with a view of determining the effect of any proposed change of custody upon the welfare of the child.

The Court in *Flickinger* further emphasized whose burden it was to prove these facts, that how that burden can and cannot be met:

> …[T]here must be substantial evidence of new facts and changes of conditions to authorize any modification of the original decree and the burden of proof in this regard rests with the moving party. This burden cannot be met without a regular hearing, with notice to the parties. *Ex parte* or in camera orders without the basic requirements of due process do not satisfy the legal requirements here expressed. Id. at 392.

The Court in *Flickinger* specifically rejected that the burden can be met or circumvented through any purported stipulation between the parties:

> It was the duty of the court below to receive evidence and to inquire into the propriety of the stipulation as to whether the same served the best interests of the children. (citations omitted). Id. at 394.

Lastly, the Court emphasized that the failure to have an evidentiary hearing was not only error, it destroyed jurisdiction, a defect which can be raised at any time:

> An order purporting to rule on a motion to modify custody provisions in a divorce decree on the grounds of changed conditions made without a hearing at which evidence is adduced has been held to be in excess of the court's jurisdiction, and such jurisdictional defect can be raised at any time. (citations omitted). Id. at 394.

The facts in *Flickinger* are eerily similar to the facts in this appeal. In both cases the Appellant mother alleged that both of their lawyers went beyond their authority by stipulating to evidence which both trial courts found as conclusive and binding. Neither trial court had a hearing or received any evidence beyond the stipulations, and both trial courts transferred custody of minor children. Both parties filed motions to set aside the judgment, which were both denied.

To avoid improper or accidental shifts of custody of children, our State's most precious assets, this court needs to reverse the trial court for failing to have the requisite hearing and necessary evidence to make the legal finding mandated by Missouri statute 452.410, namely, that the modification is necessary to serve the best interests of the child. Without such a finding, as set out in the additional cases cited below, the

judgment of the trial is a 'nullity' for lack of jurisdiction, a defect which can be asserted at any time.

Fleming v. Fleming,

562 S.W.2d 168 (Mo. App. W.D. 1978)

In *Fleming*, mother filed a writ of habeas corpus requesting that her two children be returned to her and away from the custody of her ex-husband. Id. at 169. The basis for her writ stemmed from the following. In 1975, mother and father were divorced and mother was given permanent custody of the two children born of the marriage. Id. at 169. Thereafter, the trial court entered a judgment which stated "this matter comes upon for hearing and is taken up on the stipulation agreed to between the parties hereto." Id. at 169. The trial court went on to modify the original custody decree and transferred the permanent custody of the two girls from mother to father. Id. at 169.

The sole issue in mother's writ was that trial court's judgment was illegal on its face because it was entered pursuant only to a stipulation and not based on any evidence at any hearing from which the court could make the requisite findings required by 452.410. Id. at 169. The court of appeals granted the writ noting that, just as in the case at bar, because the

judgment showed that the trial court acted only upon a stipulation and agreement to, and without hearing evidence. Id. at 170.

The Court of Appeals emphasized that section 452.410 prohibits a trial court from modifying a custody decree unless it finds that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interest of the child. Id. at 170. The court, citing the *Flickinger* case, as well as other cases, made it clear what the law is in this state regarding modifications of custody:

> From the above cases, it is clear that the court was unauthorized to modify the original decree which vested custody in Donna without a hearing. Such result is further dictated by section 452.410. Before modifying the decree, the court was required to find from facts produced at a hearing that a modification to change the custody of children is necessary to serve their best interests.
>
> The modification in this case was obtained without a hearing and without the production of any facts from which the court could determine a change in their custody was required to serve their best interests…Because the illegality

> of the modification appears on its face, Donna properly sought habeas corpus in this court to test the validity of the modification order. Id. at 170.

Just as in *Fleming*, the trial court's judgment in this case needs to be set aside because it modified and transferred custody without a hearing and without evidence.

***Riley v. Riley*, 643 S.W.2d 298 (Mo. App. W.D. 1982)**

The facts and holding in *Riley* demonstrate why and how important a hearing and evidence are to shifting custody. A summary of those facts and holding follow:

Prior to 1980, husband and wife were divorced and wife was granted primary custody of the parties' children. Id. at 299. During the summer of 1980, husband and wife entered into an agreement regarding custody of the children. Id. at 299. The agreement was reduced to writing and signed July 22, 1980. Id. at 299. The substance of this agreement was that the wife had moved to California and that the children remained behind in the custody of the husband. Id. at 299. As part of the stipulation, the wife agreed to execute an entry of appearance, waiver of personal service, consent to trial and entry of decree without

further notice so that the husband could obtain the approval of the court to the agreement. Id. at 299.

On August 6, 1980, the husband filed a motion to modify the decree as to child custody with the agreement. Id. at 299. His motion was called up for hearing September 8, 1980. Id. at 299. His wife was not present or represented and the record is silent as to any notice to her of the hearing. Id. at 299. The trial court entered an order approving the stipulation on the same day, which the court found not to be unconscionable. Id. at 299-300.

In April, 1981 the father filed a second motion to modify. Id. at 200. That motion sought modification of the original dissolution decree by a transfer of custody of the children from the wife to the husband. Id. at 300. At the hearing, the wife argued that evidence of changed circumstances should be limited to events after the last custody order, which she contends to have been the order made September 8, 1980. Id. at 300. The trial court did not agree and admitted evidence of the wife's conduct after the date on which the original dissolution decree was entered. Id. at 300. Much of the evidence relied on by the trial court as demonstrating changed circumstances concerned

the wife's conduct while the children were in her care from March until May, 1980, prior to the first modification. Id. at 300.

The Court of Appeals affirmed the trial court, stating that the order of September 8, 1980 did not modify the custody provisions of the original decree. Id. at 300. The reason that it could not modify the custody was because the trial court has no jurisdiction to award custody based only on a stipulation. Id. at 300. Stipulations and agreements aside, Missouri law requires that the trial court receive evidence and award custody as appear to be in the best interests of the children. Id. at 300. "A stipulation by the parties does not relieve the court of this responsibility." Id. at 300. In holding this proposition, the court explained:

> The court derives its jurisdiction to determine custody of children in marriage dissolution cases from §452.375 and 452.410, RSMo 1978. The trial judge entertains a special obligation as to orders pertaining to custody of minor children and he must act upon evidence adduced. **The court is without jurisdiction to modify an original custody decree on a stipulation entered into by the parties but must conduct a hearing and can only act**

upon presentation of facts from which it may be determined that a change in custody would be in the best interests of the children. (citations omitted, emphasis added). Id. at 300.

The Court of Appeals further held that the order of September 8, 1980, at least as it respects custody in decretal form, "was a nullity." Id. at 300. Hence, the wife's objection was properly overruled by the trial court. Id. at 300.

OTHER CASES

Other cases with similar facts reinforce the age old proposition of law that a judgment modifying custody that fails to have an adequate evidentiary hearing is reversible error:

1. *State of Missouri ex rel. Perrella v. McGuire, 757 S.W. 2d 223 (Mo. App. S.D. 1988)*

The reason that a stipulation cannot be the basis of modification of custody decree is because any agreement between divorced parents, including stipulations with respect to modification of child custody, is not binding on the court. Id. 225. Missouri law does not allow a trial court to modify custody based upon stipulations of the parties:

Custody of infants cannot be bartered and traded as goods in the market place, so as to foreclose a judicial determination as to the present welfare and best interests of the child. Even a stipulation by the divorced parents with respect to the modification of a child custody decree is insufficient. **Respondent was unauthorized to modify the original decree of May 6, 1987, which vested custody in relator, without holding a hearing and receiving evidence in support of a proper application.** (citations omitted, emphasis added). Id. at 225.

2. Collet v. Collet, 759 S.W.2d 876

(Mo. App. E.D. 1998)

Mother appealed the modification of the custody decree that was entered without a hearing. Id. at 876. The Court of Appeals reversed and remanded, holding:

> The court's ruling on the merits of the motion without notice to the parties and an opportunity for them to be heard was a violation of due process and requires reversal… An order purporting to rule on a motion to modify custody without a hearing at which evidence is adduced is in excess of the Court's jurisdiction… It would be in the children's best

interests for the court to hear evidence prior to ruling on matters affecting their health and welfare. Id. at 876-877.

3. Wood v. Wood, 400 S.W.2d 431 (Mo. App. E.D. 1966)

The Court of Appeals had this to say about the lack of procedural requirements in custody changes made by agreement and without a hearing:

> At the threshold of our remarks, we note the order and judgment of January 11, 1963 provided that the exclusive and undisturbed custody of the minor child shall change from one parent to the other parent each year. It appears that this order and judgment was entered by the court without a hearing and merely on the consent and stipulation of the parties. **We think this is a practice that should be rarely followed, if at all, by a trial court, and feel that evidence should be taken to determine the propriety of the stipulation and whether or not the custody provided therein serves the best interests and future welfare of the child.** Id. at 437.

CONCLUSION

The judgment of the trial court entered on July 22, 2004 and dated May 27, 2004 must be set aside for lack of jurisdiction, insufficient evidence of a change in circumstances, and insufficient evidence that the modification would serve the best interests of the children. Missouri law is clear that in order to modify custody, there has to be an evidentiary hearing that supports a trial court's finding that the modification serves the best interest of the child. It is undisputed that no such hearing in this case took place. The only possible basis for the modification would be based on the stipulation signed by the parties. Missouri law is also clear that a stipulation such as the one filed in this case cannot be the basis of a modification of custody. For those reasons and the reasons cited above, the judgment of the trial court must be reversed, the judgment dated May 27, 2004 and entered on July 22, 2004 must be set aside, and the case must be remanded for a hearing on the parties' motion to modify custody and counter-motion to modify custody, with costs taxed to the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

WITH RULE 84.06 (B) AND (C)

The undersigned hereby certifies that on the ____ day of December, 2004, two true and correct copies of the foregoing brief and one disk containing the foregoing brief were mailed to James R. Royce, 300 S. Jefferson, Suite 600, Springfield, MO 65801 and Amy M. Vernon, 123 N. Jefferson, Lebanon, MO 65536 and ten true and correct copies of the foregoing brief and one disk containing the foregoing brief was mailed to Missouri Court of Appeals, Southern District, University Plaza, 300 Hammons Parkway, Springfield, MO 65806.

The undersigned further certifies that the foregoing brief complies with Rule 55.03 and the limitations contained in Rule 84.06(b) and that the brief contains 4,969 words. The undersigned further certifies that the labeled disk, simultaneously

filed with the hard copies of the brief, has been scanned for viruses and is virus free.

_____

Mark J. Murphy Mo. Bar No. 49875

APPENDIX INDEX